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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

17 CR 683 (LAP)

5 CHUCK CONNORS PERSON and
6 RASHAN MICHAEL,

7 Defendants.

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8
9 New York, N.Y.
February 5, 2018

10 Before:

11 HON. LORETTA A. PRESKA,

12 District Judge

13
14 APPEARANCES

15 GEOFFREY S. BERMAN
16 Interim United States Attorney for the
Southern District of New York
17 NOAH D. SOLOWIEJCZYK
EDWARD B. DISKANT
18 ALINE R. FLODR
Assistant United States Attorneys

19
20 SHER TREMONTE, LLP
Attorneys for Defendant Person
21 THERESA M. TRZASKOMA
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22 COOLEY, LLP
Attorneys for Defendant Michael
23 JONATHAN P. BACH
KAITLAND McCANN KENNELLY
24 STEPHANIE SCHUYLER

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(In open court; defendants not present)

THE COURT: United States v. Person. Is the government ready?

MR. SOLOWIEJCZYK: Yes. Good morning, your Honor. Noah Solowiejczyk on behalf of the government. I'm joined by Edward Diskant and Aline Flodr.

THE COURT: Counsel for Mr. Person?

MS. TRZASKOMA: Theresa Trzaskoma from Sher Tremonte, and with me is my colleague Emma Spiro.

THE COURT: Counsel for defendant Michael?

MR. BACH: Michael Bach with Kaitland Kennelly and Stephanie Schuyler.

THE COURT: Where do we stand, friends?

MR. SOLOWIEJCZYK: Your Honor, over the past few months the government has made multiple discovery productions. I think at this point it is safe to say that discovery is substantially complete. There will probably be a few straggler subpoena returns, that sort of thing, but all the Title III intercepts have been produced, all the consensually recorded calls have been produced, text messages, various subpoena returns. So it is a significant amount of material that's been produced in the last two months.

THE COURT: Thank you. What do you want to do next?

MR. SOLOWIEJCZYK: I think that at this point the government's ready to set a schedule, motions, a trial date in

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1 the future, if the defense is ready for that.

2 THE COURT: Do we anticipate any motions, friends?

3 MS. TRZASKOMA: Yes, your Honor. I believe I speak on
4 behalf of Mr. Bach as well. We anticipate that we will have a
5 motion on the face of the indictment. And --

6 THE COURT: Saying what?

7 MS. TRZASKOMA: That we believe there are serious
8 defects in the indictment, that the legal theories proposed --

9 THE COURT: Like what?

10 MS. TRZASKOMA: I'm sorry?

11 THE COURT: I know you say you think there are defects
12 in the indictment. Tell me something I don't know. Tell me
13 what you think is defective.

14 MS. TRZASKOMA: Well, your Honor, we think with
15 respect to each of the charges brought by the government
16 against the defendants in this case, that they're advancing
17 novel uses of the bribery statute, the honest services fraud
18 statute, and wire fraud. And --

19 THE COURT: So what's wrong with them, is the
20 question.

21 MS. TRZASKOMA: That we think that they cannot be
22 stretched so far to cover what our essentially violations of
23 the NCAA rules. And we're prepared --

24 THE COURT: I don't think anybody, at least I didn't
25 understand any of you to be taking the position that these

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1 weren't violations of the rules. But nobody cares about that.
2 The question is do they fall within the statutes.

3 MS. TRZASKOMA: Yes, your Honor. We think they don't.

4 THE COURT: Counsel. I know you think they don't.
5 Tell me why.

6 MS. TRZASKOMA: Well, I think -- with respect to wire
7 fraud, well, I guess we can start with wire fraud, for example,
8 your Honor. We don't think there is -- that there has been
9 sufficient allegations that -- the government's theory is that
10 Auburn University was defrauded here. And we don't believe
11 that the allegations amount to a fraud on Auburn University.
12 We think there is actually case law from the Seventh Circuit
13 that flatly rejects the government's efforts to use the wire
14 fraud statute under facts similar to those here.

15 Similarly, there are problems with the government's
16 honest services fraud theory in terms of whether or not the
17 government has sufficiently identified a duty that was owed.
18 And we think the same problem exists with respect to 666.

19 THE COURT: Okay. Do you want to add anything,
20 Mr. Bach?

21 MR. BACH: No, Judge, and I apologize for not being
22 able to articulate. These are very case-law specific issues
23 that go to statutory interpretation. We've been working --

24 THE COURT: I understand. But we'd like to have a
25 little hint of what we're waiting around for.

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1 MR. BACH: Understood.

2 THE COURT: All right. Mr. Solowiejczyk, what do you
3 have to say?

4 MR. SOLOWIEJCZYK: Your Honor, we just briefed this
5 issue, one of these statutes in front of Judge Kaplan. That's
6 pending, the wire fraud statute as to honest services fraud,
7 and I'm not going to go through all of our arguments at this
8 point. There is a clear fiduciary duty between an employer and
9 an employee, and the scheme we've alleged here clearly exposed
10 the university to some significant harm as a result of the
11 conduct of their fiduciaries, the coaches.

12 But at this point, your Honor, we're happy to respond
13 in due course to these motions but we believe these --

14 THE COURT: Of course. Of course you're happy to
15 respond. And of course we believe that.

16 MR. SOLOWIEJCZYK: The government did a lot of
17 diligence and research before bringing these charges, the
18 government thought long and hard, and these fall comfortably
19 within these statutes. Just because they happen to be in the
20 area of basketball, it doesn't mean that at the end of the day
21 the statutes don't apply to that area of commerce, business in
22 the world. So, just because this is a case about basketball,
23 it doesn't mean that you can't commit honest services fraud or
24 you can't commit bribery, and nobody is saying it is just a
25 pure NCAA rules violation. There have to be other things that

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1 go with that, and the government believes it has alleged as
2 much, and as we said, in due course we'll respond to any
3 motions.

4 THE COURT: When are you going to make your motion,
5 counsel?

6 MS. TRZASKOMA: I would propose that the defense
7 motions be made by March 9.

8 THE COURT: All right. When does the government want
9 to respond? Is that okay with you, Mr. Bach?

10 MR. BACH: Yes. To be clear, that would be a motion
11 on the legal sufficiency of the indictment.

12 THE COURT: Do you have other motions up your sleeve?

13 MR. BACH: I think we do.

14 THE COURT: Let's hear it.

15 MR. BACH: We might well challenge the wiretap in this
16 case. That requires more work and more thought.

17 THE COURT: On what basis?

18 MR. BACH: Well, first of all, there were less
19 intrusive means available to the government. They concocted
20 this case through their own cooperator. And they had a
21 cooperator who was actively engaged with a team of FBI agents
22 with all kinds of consensual monitoring. And you can't -- you
23 can't have a wiretap if it's clear that there are less
24 intrusive means available to conduct an investigation in a
25 meaningful and adequate way, and I think the government really

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1 showed it was able to do that here without resorting to Title
2 III. So that would be --

3 THE COURT: When do you want to make that, March 9?

4 MR. BACH: No, I'd like -- because we're studying the
5 wiretap and the discovery and questions -- I think my client
6 has some 30 hours of taped conversations. And we're still
7 trying to figure out from the government which of those it
8 views as more important than others. I would like some time to
9 analyze and sort through that material.

10 THE COURT: Mr. Solowiejczyk.

11 MR. SOLOWIEJCZYK: Your Honor, we think it makes sense
12 to have all the motions on the same schedule, to not bifurcate
13 the motions. It is just going to create more work for
14 everybody. So if Mr. Bach thinks he needs more time maybe it
15 makes sense to --

16 THE COURT: I don't know it makes sense to push them
17 all back. It sounds like they're pretty discrete arguments.

18 MR. SOLOWIEJCZYK: They are, your Honor. Just to have
19 rounds and rounds of briefing on two different sets of motions,
20 it sometimes creates additional work for all the parties. But
21 if the Court thinks that's the preferrable course, of course
22 then we'll do that.

23 THE COURT: I think we might as well just get it over
24 with. When do you want to move, Mr. Bach?

25 MR. BACH: Can we have an additional 30 or 60 days on

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1 that motion?

2 THE COURT: 30 more. So whatever the next business
3 day is closest to April 9. When does the government want to
4 respond to the indictment motion?

5 MR. SOLOWIEJCZYK: If the government could respond on
6 the date that Mr. Bach files the new motion so a month --

7 THE COURT: So a month out.

8 MR. SOLOWIEJCZYK: Yes.

9 THE COURT: Okay. And reply in two weeks after that,
10 counsel.

11 MS. TRZASKOMA: Yes, your Honor. That would be I
12 think April 23.

13 THE COURT: Okay. Then same thing for Mr. Bach's
14 motion. 30 days and two weeks. All right. Okay.

15 What else, friends?

16 MR. BACH: One housekeeping matter, your Honor. My
17 client has been reporting to pretrial services in North
18 Carolina, in Charlotte, but he's now living primarily in
19 Atlanta. And he would like to switch his pretrial supervision
20 to Atlanta.

21 THE COURT: Any objection from the government?

22 MR. SOLOWIEJCZYK: No, your Honor.

23 THE COURT: All right. Done.

24 MR. BACH: Okay. And I don't know whether I need a
25 piece of paper to show the pretrial services.

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1 THE COURT: Why don't you folks work it out.

2 MR. BACH: Will do.

3 THE COURT: All right. I hear that you don't want to
4 go to trial until a year from now. Why is that?

5 MR. SOLOWIEJCZYK: Your Honor, this is partially the
6 government. We have a trial date already in the Gatto matter
7 in front of Judge Kaplan in October. That will take probably
8 about a month. So the government, the attorneys working on
9 this case will be occupied in October with that trial.

10 I will say the discovery here is quite voluminous.
11 Defense counsel can tell me if I'm wrong, but I doubt defense
12 counsel has made it through all the discovery at this point.

13 THE COURT: But today is February of 2018.

14 MR. SOLOWIEJCZYK: It is certainly a long time. We
15 recognize that, your Honor. Because there are three different
16 cases here, it will be very hard for the government to try the
17 case I think before February, because we're going to be
18 occupied with the other trial.

19 THE COURT: All right. February 4, 2019. Also, as
20 usual, I'd like the requested voir dire questions and the
21 request to charge a week before trial, please.

22 What else, friends?

23 MR. SOLOWIEJCZYK: If there is nothing further from
24 the defense, the government would move to exclude time until
25 the trial date. This will allow the defense to continue to

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1 review discovery, to file any motions, for the parties to
2 continue discussions of any pretrial dispositions.

3 THE COURT: Any objection, friends?

4 MS. TRZASKOMA: No, your Honor.

5 MR. BACH: No.

6 THE COURT: In order to permit all of those activities
7 to go forward, time between today and February 4, 2019 is
8 excluded from calculation under the Speedy Trial Act in the
9 interest of justice.

10 Anything else?

11 MR. SOLOWIEJCZYK: Nothing further.

12 THE COURT: Thank you, friends. Good morning.

13 (Adjourned)
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